

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 20, 2003

EARL DAVID CRAWFORD V. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Bradley County
No. 89-677 Stephen R. Bebb, Judge

No. E2002-02334-CCA-R3-PC
August 4, 2003

Appellant, Earl David Crawford, appeals the trial court's denial of his petition for post-conviction DNA testing. *See* Tenn. Code Ann. § 40-30-403. In his appeal, Appellant concedes that the physical evidence taken by the State in 1986 during the investigation of his case has been destroyed. Appellant argues, however, that the trial court erred in not permitting the results of the tests performed on the physical evidence in 1986 to be compared to current DNA samples from Appellant, the victim, and the victim's husband. Appellant also argues that the trial court erred in permitting the Public Defender's Office to withdraw from representing Appellant in this matter without appointment of new counsel to represent him in this appeal. After a review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Earl David Crawford, Nashville, Tennessee, *pro se*.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Jerry N. Estes, District Attorney General; and Joseph V. Hoffer, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In 1986, Appellant was convicted of aggravated rape, aggravated kidnapping and armed robbery. The trial court sentenced Appellant to two life sentences for the aggravated rape and aggravated kidnapping convictions and thirty-five years on the armed robbery conviction. The sentences were ordered to be served consecutively. The facts leading up to Appellant's convictions have been summarized as follows:

[O]n April 16, 1986, at 11:15 p.m. the female victim of these crimes was accosted at gun point and driven away in her car from the location where she worked. She was taken to a remote location and raped by the man who kidnapped her. The woman was then forced into the trunk of her car and returned to the place where she had been abducted. The victim in this case identified [Appellant] as the perpetrator of these crimes. The woman was rescued from the trunk about three hours after being locked therein. Subsequently, she discovered her purse and some cassette tapes had been taken from the interior of the car. Approximately two hours after this crime, [Appellant] was arrested in Marion County. He was in possession of a stolen vehicle which contained the victim's purse and the cassette tapes.

State v. Earl David Crawford, 1987 WL 19611, at *1, C.C.A. No. 258 (Tenn. Crim. App., Knoxville, Nov. 10, 1987).

Appellant's convictions were affirmed on direct appeal. *Id.* On June 28, 1989, Appellant filed a "petition for post-conviction relief filing to be held in abeyance" in which he stated that he intended to file a timely post-conviction pleading before the statute of limitations ran on July 1 of that year. Appellant did not file any further petitions, and in 1996 the trial court dismissed the original petition with prejudice for failure to prosecute. This Court upheld the dismissal of Appellant's petition for post-conviction relief, noting that Appellant did not meet any of the very limited criteria that would permit the tolling of the statute of limitations applicable in post-conviction proceedings. *Earl Crawford v. State*, 1997 WL 420771, No. 03C01-9610-CR-00385 (Tenn. Crim. App., Knoxville, July 29, 1997).

Appellant then filed a motion for DNA analysis of the existing evidence pursuant to the Post-Conviction DNA Analysis Act of 2001, Tennessee Code Annotated sections 40-30-401 to 40-30-413, and requested the appointment of counsel to assist him with his petition. In its response, the State acknowledged that the Cleveland Police Department had collected hair samples from the crime scene, blood and hair samples from the victim, swabs of the victim's vagina, and hair and blood samples from Appellant. The police department forwarded this physical evidence to the TBI for forensic analysis, and the TBI later forwarded several of the hair samples to the FBI for further analysis. However, in response to the State's inquiries, none of these agencies could locate any physical evidence pertaining to Appellant's convictions. Other than a reference to some type of forensic analyses by the FBI and TBI, the record does not disclose what tests were performed on the biological specimens or the results, if any, of the tests. In its prosecution, the State apparently relied primarily on the victim's identification of Appellant as the perpetrator of the offenses and Appellant's possession of the victim's purse and cassette tapes when apprehended.

Following the State's response to his petition for DNA analysis, Appellant filed a motion to "dismiss" his convictions based on the State's "loss and/or destruction of potentially exculpatory evidence." The trial court denied Appellant's petition based upon the lack of any physical evidence upon which to perform a DNA analysis and permitted Appellant's appointed counsel to withdraw from representing Appellant in this matter. The trial court also denied Appellant's motion to dismiss, and Appellant does not appeal this action by the trial court. Appellant does appeal,

however, both the trial court's dismissal of his petition as well as the order permitting Appellant's counsel to withdraw without appointing counsel to assist Appellant with his appeal.

As relevant here, the Post-Conviction DNA Analysis Act of 2001 provides that a person convicted of aggravated rape "may at any time, file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence." Tenn. Code Ann. § 40-30-403. There is no statute of limitations governing such petitions. *Id.* After the State has had an opportunity to respond to a petitioner's request, the trial court is obligated to order DNA analysis when the petitioner has met each of the following four conditions:

- (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
- (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;
- (3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and
- (4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Id. -404. In addition, if DNA analysis would have produced a more favorable verdict or sentence if the results had been available at the proceedings leading up to the conviction or sentence, then the trial court may order DNA analysis when the petitioner meets the same conditions. *Id.* -405.

In either instance, some physical evidence must be available and in a proper condition to enable a DNA analysis. *Id.* -404(2). The absence of any one of the four statutory conditions results in the dismissal of the petition. *William D. Buford v. State*, 2003 WL 1937110, at *6, No. M2002-02180-CCA-R3-PC (Tenn. Crim. App., Nashville, April 24, 2003). Although Appellant concedes that the evidence from his 1986 case has been destroyed, he suggests as an alternative that he, the victim and the victim's husband provide current samples for DNA analysis, and then compare the results of this DNA analysis to the results of the tests performed in 1986. To what end Appellant does not say, but we decline to accept his suggestion.

The record does not give any indication as to what tests were performed in 1986 other than a reference in the State's response to a "forensic analysis" performed by the FBI on some of the hair samples. Nonetheless, the focus of the Post-Conviction DNA Analysis Act is limited. A petitioner who is otherwise barred from seeking post-conviction relief by the applicable statute of limitations may still request a DNA analysis, which, in many instances, was not available at the time of the petitioner's conviction. *See* Tenn. Code Ann. § 40-30-403 (Petitioner may file a petition at any time). "DNA analysis" is defined as "the process through which deoxyribonucleic acid (DNA) in

a human biological specimen is analyzed and compared with DNA from another biological specimen for identification purposes.” Tenn. Code Ann. § 40-30-402.

The statute clearly limits its reach to permit only the performance of a DNA analysis which compares the petitioner’s DNA samples to DNA samples taken from biological specimens gathered at the time of the offense if all four statutory criteria are met. The statute does not authorize the trial court to order the victim to submit new DNA samples years after the offense nor does the statute open the door to any other comparisons the petitioner may envision. “The trial court is under no obligation to order DNA analysis of evidence unless it finds that the evidence is still in existence and in such a condition that DNA analysis may be conducted.” *Clinton Wayne Lynch v. State*, No. M2002-02801-CCA-R3-PC, 2003 WL 21349919 (Tenn. Crim. App., Nashville, June 10, 2003). In response to Appellant’s petition, the State attached affidavits from the unit chief of the trace evidence division of the crime laboratory at the FBI, a forensic serologist from the TBI, and the evidence custodian from the Cleveland Police Department, all attesting that no evidence pertaining to *State v. Earl Crawford* could be located. Because the Post-Conviction DNA Analysis Act did not become effective until some fifteen years after Appellant’s convictions, “the pre-trial obligation of the prosecution to preserve evidence would not apply.” *Id.* at *1.

Appellant complains that he should have been extended the opportunity to cross-examine the representatives of the various law enforcement agencies involved in Appellant’s case concerning their inability to locate any physical evidence at an evidentiary hearing prior to the dismissal of his petition. The trial court had sufficient evidence to determine that the biological specimens were no longer available. Based on the information before it, the summary dismissal of Appellant’s petition was appropriate. *See* Tenn. Code Ann. § 40-30-409; *Burford*, 2003 WL 1937110, at *6. “The Tennessee act does not specifically provide for a hearing as to the qualifying criteria and, in fact, authorizes a hearing only after DNA analysis produces a favorable result.” *Burford*, 2003 WL 1937110, at *3.

Finally, Appellant argues that the trial court erred in not substituting counsel to assist him with his appeal after permitting his appointed counsel to withdraw. Whether to appoint counsel to assist a petitioner in pursuing his claims under the Post-Conviction DNA Analysis Act is left to the discretion of the trial court. Tenn. Code Ann. § 40-30-407. From the record, it appears that Appellant was appointed counsel at some point during the proceedings, and a motion to dismiss his convictions was filed on his behalf following the State’s response to Appellant’s petition. The record supports the trial court’s finding that no evidence from Appellant’s original trial was still in existence, and Appellant’s efforts to secure DNA analysis were therefore futile. Although Appellant correctly argues that an indigent defendant has the right to assistance of counsel through the first appeal as of right and a statutory right to counsel on the appeal of his first post-conviction petition, the appointment of counsel under Tennessee Code Annotated section 40-30-407 is discretionary. *House v. State*, 911 S.W.2d 705, 712 (Tenn. 1995); *Drummerv. State*, 6 S.W.3d 520, 522-23 (Tenn. Crim. App. 1999). Appellant is not entitled to relief on this issue.

Conclusion

After a review of the record in this matter, we affirm the judgment of the trial court.

THOMAS T. WOODALL, JUDGE